IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; CAROLYN PARRY, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and Assistant Adminis-

(Additional parties listed on next page)

On Appeal from the United States District Court for the Southern District of New York
(Three Judge Court)

JURISDICATIONAL STATEMENT OF NEW YORK CITY APPELLANTS

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trator of NEW YORK CITY SPECIAL SERVICE FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE,

Appellants-Defendants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

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No.

HENRY SMITH, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; CAROLYN PARRY, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and Assistant Administrator of NEW YORK CITY SPECIAL SERVICE FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Appellants-Defendants,

(Additional parties listed on next page)

On Appeal from the United States District Court for the Southern District of New York (Three Judge Court)

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO, and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

JURISDICTIONAL STATEMENT OF NEW YORK CITY APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an order and judgment entered on April 14, 1976, by a Three Judge Court for the Southern District of New York which declared Sections 383(2) and 400 of the New York So-

cial Services Law and a regulation promulgated thereunder, 18 N.Y.C.R.R. §450.14, as presently applied, to be in violation of the constitutional rights of foster children in the certified class. The order enjoined the defendants from removing or authorizing the removal of any foster children from foster homes in which they have lived continuously for more than one year without notice and hearing at which the foster parents, the foster child and the biological parents could present evidence.

On May 24, 1976, this Court stayed the enforcement of the order and judgment of the Three Judge Court pending the docketing of the appeal. A copy of the stay is appended hereto as Appendix A.

OPINION BELOW

The majority opinion of the three

judge court is reported at 411 F. Supp. 1144. Judge Pollack's dissenting opinion is not reported in the official reports. Both the majority and the dissenting opinions are set forth in the Joint Appendix attached to the Jurisdictional Statement of the New York State appellants.

JURISDICTION

The judgment and order of the Three Judge Court of the District Court for the Southern District of New York was filed on April 14, 1976. The New York City Appellants filed a Notice of Appeal to this Court on June 9, 1976. The Notice of Appeal is annexed hereto as Appendix B. Jurisdiction is conferred on this Court by 28 U.S.C. §1253, this appeal is of an order and judgment of a three judge court granting a permanent injunction and declaring unconstitutional state statutes

and regulations having statewide applicability.

STATUTES AND REGULATION INVOLVED

McKinneys' New York Social Services Law

Section 383(2)

> "2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded."

* * *

Section 400

> "When any child shall have been placed by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

Title 18 of the New York State Code of

Rules and Regulations

> "450.14[now §450.10] Removal from

<u>foster family care</u>. (a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof."

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home unitl at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section."

QUESTIONS PRESENTED

1. Was there a sufficient case or controversy within the provisions of Article 3 §2 Clause 1 of the United States Constitution to permit the Three Judge Court to determine on the merits that foster children who have lived continuously in a foster home for more than one year are entitled to hearings before removal from the foster homes, where the court appointed counsel for the foster children class argued that such pre-removal hearings were not constitutionally required and that the challenged statutes and regulations were constitutional?

2. Does the due process clause constitutionally require state and municipal officials to afford certain foster children hearings before removing the foster children from their foster homes?

3. Assuming, arguendo, that due process does require a prior hearing, does the procedure promulgated by the City of New York, which procedure provides a hearing for all foster parents who request it, except where the child is being returned to his natural parent, or where there is an emergency and where the child has not lived in the foster parents' house for more than one year, satisfy due process?

4. Are the two classes which have been determined before to be appropriate, all foster parents who have had a foster child live with them continuously for one year and all foster children who have lived continuously with their foster parents for one year, proper?

STATEMENT OF CASE

(1)

This action for declaratory judgment

and injunctive relief was commenced on May 9, 1974.* The action was brought on behalf of two separate classes of plaintiffs. One class consists of all children in New York State who have been in a particular foster home continuously for more than one year (Second Amended Compl., par 5). The other class consists of all foster parents who have foster children in their home continuously for more than one year (id. par 5, 13).**

*Since the commencement of this action Henry Smith has succeeded James Dumpson as Administrator of the Human Resources Administration and Carolyn Parry has succeeded Elizabeth Beine as Director of New York City Bureau of Child Welfare.

** References in parentheses are to the original papers submitted to the Three Judge Court. The factual statement is intentionally brief and is intended to supplement the factual statements submitted by the other appellants.

The defendants are state and local officials who, under the applicable provisions of the Social Services Law and regulations, are charged with administering foster-care services in New York State. The intervenor-defendants are the natural parents who have placed their children in foster care.

The complaint sought a declaration that Sections 383(2) and 400 of the New York Social Services Law and 18 N.Y.C.R.R. 450.14 [now 450.10] violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment (compl., pars. 59-77). Section 383(2) permits an authorized agency, which has placed a foster child in a foster home, to remove such child when in their discretion a change is warranted. Section 400 authorizes the local welfare officer who has placed a child in a foster home

to remove the child. 18 NYCRR 450.14 sets forth a procedure required to be followed by the authorized agency or local welfare officer before a child can be removed from his foster home. The procedure provides for ten days notice to the foster parents. The written notice informs the foster parents of the availability of an administrative conference if requested by them. If a hearing is requested, the child cannot be removed until three days after notice of the decision has been sent to the foster parents. The decision must also advise the parents of thei. right to request a fair hearing pursuant to Section 400 of the Social Services Law.

The complaint contended that these procedures did not provide the foster parents and foster children with a full hearing before the children were removed and, there-

fore, the procedures were defective (id., par.61).

The complaint requested that a three judge court be convened (Compl., page 23). After the three judge court was convened, the court on its own motion, assigned independent counsel to represent the foster children. The plaintiff foster parents moved for an order continuing the New York Civil Liberties Union as counsel for the foster children, or in the alternative, for the appointment of a guardian ad litem for the children. Both requests were denied, in an opinion, by Judge Carter on December 10, 1974.*

*After the Three Judge Court had rendered its decision on the merits on March 22, 1976, the plaintiff foster parents again moved to substitute new counsel. The motion was denied on June 30, 1976. The plaintiff foster parents have filed a notice of appeal to the Court of Appeals and sought an expeditious hearing. The appeal is scheduled to be heard the week of October 12, 1976.

Prior to the convening of the three judge court, on August 5, 1974, the New York City Defendants promulgated a new procedure, SSC Procedure No. 5, for the removal of foster children from foster homes (procedure attached hereto as Appendix C). The new procedure applies to all removals of foster children except where foster children are being returned to their natural parents, emergency situations or where the foster child has been in the foster home for less than one year. Pursuant to the procedure, if the foster parents object to the removal of the child, they are entitled to request an agency conference or independent review on a form provided them by the New York City Department of Social Services (SSC Procedure No. 5, p. 2, par.6). An independent review is conducted by an independent review officer. At the review

the foster parents can be represented by counsel and present witnesses and other evidence (id., at p.4). A tape recording is made of the proceedings. Within five days, the reviewer is required to render a written decision and advise the parents of their right to a State fair hearing (id.).

During the proceeding before the Three Judge Court, expert testimony was presented relating to the emotional attachments between foster parents and foster children. The testimony also compared the foster home relationship with biological parenthood. The testimony was conflicting (Compare Dr. Marie Friedman, deposition of March 3, 1975, pp. 9-10 and Dr. Albert Solnit, deposition, of April 1, 1975, p.13, with David Fanshel, deposition of April 8, 1976, p. 38, Henry Grunebaum,

deposition of April 10, 1975, p.20).

(2)

In granting the injunction and declaring the challenged statutes and regulations to be unconstitutional as applied, the Three Judge Court (one judge dissenting) noted that it had to determine whether the procedures established by the challenged statutes and regulations deprived the foster parents of "liberty and property interests" without due process of law. 411 F. Supp. p. 1146.

The Court found that the foster parents did not have a property interest citing this Court's decision in Board of Regents v. Roth, 408 U.S. 564 (1972). 411 F. Supp. at p. 1148. It noted that foster parents could not have any expectancy of continuing their foster care relationship with a particular child since each foster parent,

prior to accepting a foster child, is required to sign a form which reserves to the agency the right to "recall the child upon request, realizing that such request will only be made for good reason." 411 F. Supp. at p. 1148.

The Court, citing Goldberg v. Kelly, 397 U.S. 254 (1970), and Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951), apparently found that a foster care relationship is similar to a biological family, and, therefore, that foster children are entitled to be heard before being subject to possible "harmful consequences of a precipitious and perhaps improvident decision to remove a child from his foster family." 411 F. Supp. at p.1150.

The Court then reviewed the new procedures implemented by New York City on July 1, 1974, during the pendency of the

the proceeding. It found those procedures deficient because the pre-removal hearing is available only upon the affirmative request of the parents. Such a restriction "is inconsistent with our holding that it is the child's right to avoid arbitrary dislocation which necessitates a hearing." 411 F. Supp. at p.1152.

The Court also found New York City's regulations to be deficient since they have no applicability when the child is returned to the natural parents. The Court could not find any basis for such a distinction. 411 F. Supp. at p. 1153.

The New York City procedures provided an independent review attended by the foster parents and the agency representative. The Court found that, to insure that all relevant material is presented to the hearing examiner, the child and biological parent

should be heard as well. 411 F. Supp. at p. 1153.

(3)

In dissenting, Judge Pollack reviewed the challenged procedures which included an administrative review before removal and a fair hearing after removal. The fair hearing decision was subject to court review in an Article 78 proceeding in the New York State Courts (dissenting opinion, p.1).

The judge noted that all the judges on the panel agreed that there was no merit to the plaintiff foster parents' argument that the foster parents have a property interest in the retention of the foster child (id. at p.3). The judge further noted that the majority had found a liberty interest entitling foster children to a pre-removal hearing over the objection of the representative of the children, who urged that

the challenged procedures were constitutional (id. at p.4). The position on the children taken by the Court was urged only by the foster parents who have no standing to assert the children's interest (id.).

As to the merits, Judge Pollack found that the Court should not interfere with the delicate system of foster care established by the New York State legislature (id. at p.6). He noted that the pre-removal conference and the procedures leading thereto had not been shown to be defective from the viewpoint of the foster child (id. at p.8). He concluded (pp.8-9):

> "The State legislature which spawned the statutory scheme that makes the foster parent-child relationship possible has made the rational decision that until it is 24 months old this relationship can never be sufficiently strong to require pre-termination hearing protection. While not abdicating its constitutional responsibilities or improperly deferring to a state legislature, the Court should not overturn

the legislature's decision absent adequate proof that it is irrational or unfair. In short, it can recognize the State legislature's superior factfinding ability and it can agree with that legislature's decision without avoiding its obligation to determine what does and does not satisfy the Due Process Clause.

The Supreme Court has warned against a return to the days of substantive due process.

Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.... We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.... we refuse to sit as a 'super legislature to weigh the wisdom of legislation,' [citation omitted] and we emphatically refuse to go back to the time when courts used the

Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' [citation omitted].... The ... statute may be wise or unwise. but relief, if any be needed, lies not with us but with the body constituted to pass laws for the State.... Ferguson v. Skrupa, 372 U.S. 726, 729-732 (1963).

This warning applies equally well to the social as to the economic sphere. While (in the first two years of foster parentage) it may conceivably be wiser to hold a pretermination hearing to hear the parties out, it is not, thereby, constitutionally required. The evidence has not shown that, during those first two years, the foster parents and the foster child are not afforded adequate due process. The choice of providing a pretermination hearing after one year of foster parentage rather than the two year period now embodied in SSL §383(3) through the right of intervention, is a a choice that seems particularly legislative in character."

THE QUESTIONS ARE SUBSTANTIAL

(1)

We join in the arguments presented by the other appellants. We will present some additional brief comments.

Article III Section 2 Clause 1 of the United States Constitution limits the exercise of judicial power to "cases" and "controversies". The controversy "must" be definite and concrete, touching the legal relations of parties having adverse legal interests. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). See also; O'Shea v. Littleton, 414 U.S. 488, 493 (1974).

In this case, the decision of the Three Judge Court was not based on the legal relations of the parties having adverse interests. The Court, rejecting the claims of the plaintiff foster parents, held that the rights of the foster children under

due process required that a hearing be held before a child could be removed from a foster home. The existence of such a right was not urged upon the court by any party or his attorney to the proceeding. Indeed, the court appointed attorney for the children argued that the challenged procedures were adequate to protect the rights of foster children.

Apart from the absence of any party or his attorney asserting the position adopted by the Court, the relief actually granted was never requested by any party or his attorney at any time during the proceeding. The New York Civil Liberties Union, the attorneys for the plaintiff foster parents, who originally brought the action on behalf of foster parents and foster children, only sought relief that would permit foster parents who requested a hearing to be given

such a hearing before the removal of the child (See Compl, pars. 29, 30, 31, 33, 59, 70; Plaintiffs' Memorandum of Law in Support of Motion for Declaratory Judgment and Preliminary Injunction, at pp. 26-27). Despite the absence of any party or his attorney requesting such relief, the Court held that every child in a foster home has a right to a hearing before removal even if the foster parents do not request such a hearing.

The determination of the important constitutional issues by the Court in favor of the plaintiff foster children, contrary to the position taken by the children's counsel, and the granting of relief not suggested to the court by any party before it, violated the requirements of Article III, Section 2, Cl. 1.

With respect to the merits, we submit that the decision of the Court in this case, invoking procedural due process so as to require an evidentiary hearing before a child who has continuously resided in a foster home for more than a year can be removed from the foster home, is incorrect.

We do not deny that there may exist an emotional relationship between a foster child with a foster parent, which upon severance could have some affect on the foster child. We submit, however, that this emotional relationship, somehow becoming constitutionally significant after one year, does not entitle the foster child to a due process hearing.

The requirements of due process are flexible and differ in response to the nature of the proceeding and the character

of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960). Some of the factors to be considered include the nature of the right or interest that is threatened, the extent to which the proceeding is adversarial in character, the severity and consequences of any action that might be taken and the administrative burden that would be imposed in requiring a hearing.

Applying these factors to various factual situations, this Court has found that certain interests were so fundamental as to require a hearing before such interests could be adversely affected by government action. A prior hearing has been required where the government action deprived individuals of the very means they needed to survive. Goldberg v. Kelly, 397 U.S. 254 (1970).

Similarly, the individual's right to earn a living in his chosen occupation was determined to be a fundamental right, and therefore a license to engage in that occupation could not be revoked without a hearing. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). See also Bell v. Burson, 402 U.S. 535 (1971). It is noteworthy that, where an individual was not barred from his profession but only refused re-appointment to a job, this Court held that due process did not require a hearing before the termination of employment. Board of Regents v. Roth, 408 U.S. 564 (1972). Even where the individual, had worked in the college system for a period in excess of ten years, this Court held that due process required a hearing only if it could be shown that the individual had the contractual equivalent

of job tenure. Perry v. Sindermann, 408 U.S. 593 (1972). Cf. Bishop v. Wood, __ U.S. __, 48 L. Ed. 2d 684 (1976).

In the instant case, the interest, however, defined, of the foster child in the foster care relationship with a specific foster family is adequately protected by the challenged administrative procedures and existing court remedies. Cf. Arnett v. Kennedy, 416 U.S. 134 (1974). The administrative procedure requires the public welfare department or authorized agency to give the foster parents ten days notice of a removal of a foster child from their home. Following the notice, the foster parent may request an administrative conference. The child cannot be removed until three days after the conference. A decision to remove can be challenged by

the parent in a fair hearing. The foster parent can seek review of a determination in an Article 78 proceeding in the New York Supreme Court pursuant to CPLR 7800 et seq.

In addition to these administrative procedures, the New York State Legislature, has authorized periodic review by the Family Court of all children in foster care for a continuous period of 18 months.* New York Social Services Law, Section 392. The authorized agency charged with the care of a foster child is required to file a petition seeking such review. In addition, the foster parents are permitted to file a petition for review and participate in the Family Court proceeding. During the proceeding the foster care parents are entitled to give their opinions to aid the

*The original law provided for a twenty four month period which was reduced to eighteen months in 1975. Chap. 708.

Family Court in determining what future placement would be in the best interests of the child. Section 383.

The Three Judge Court, citing Goldberg v. Kelly, 397 U.S. 254 (1970), found, apparently on the theory that the removal implicates the child's liberty interest, that the children's right to avoid arbitrary dislocations requires a pre-removal hearing. In Goldberg this Court noted that the crucial factor was that "termination of aid pending resolution of the controversy over eligibility may deprive an eligible recipient by which to live while he waits" (397 U.S. 564). Two other factors were present in Goldberg: welfare was mandated by federal law and an evidentiary hearing would be appropriate because the issue of eligibility would be determined based on eyewitness testimony and documentary evidence.

In this case, unlike in Goldberg, the children will continue to be provided with foster care services during the pendency of the administrative procedures and subsequent court proceedings. Unlike welfare, foster care service is not a mandated federal program but established by state laws, which laws also provide the conditions under which foster parents accept foster children. In addition, any evidentiary hearing would primarily consist of opinion testimony as to what is best for the child. The challenged statutory procedures, instead of requiring a full hearing, properly rely on the expertise of the social services workers, who, because of their knowledge and experience, can determine whether it is in the best interests of the child to be removed from a foster home. It can be presumed that the social service workers act

in the child's best interest. These workers have no adverse interest financial or otherwise, which would be furthered by removing a child from a particular foster home.

In Matthews v. Eldridge, ___ U.S. ___ 96 S. Ct. 893 (1976), this Court, in holding that a hearing was not required before terminating disability benefits, distinguished Goldberg, noting that the determination of eligibility for disability benefits is best determined by medical personnel and tests, rather than an evidentiary hearing.

The Court in the instant case stated that it would not consider plaintiffs' assertion that a foster home is entitled to the same constitutional protection as the traditional biological family. 411 F. supp. at p. 1144. But in determining that the foster children are entitled

to pre-removal hearings, the Court has in fact increased the rights of foster parents and decreased the rights of the biological parents. Such a result conflicts with this Court's recognition of the unique rights attaching to the biological family. Compare Stanley v. Illinois, 405 U.S. 645 (1972) with Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). See also, Ramos v. Montgomery, 315 F. Supp. 1179 (S.D., Col., 1970), affd. 400 U.S. 1003 (1971).

This diminution of the biological family's rights is contrary to the intent of the foster care program to return the children to the biological parents as soon as possible. See Matter of Jewish Child Care Assn. (Sanders) 5 NY 2d 222, 225 (1959).

This Court has recognized the principle that a court should not substitute its social and economic beliefs for the judgment of legislative powers under the authority of the due process clause. Ferguson v. Skrupa, 372 U.S. 726, 729 (1963). Consistent with Ferguson, this Court recently in Paul v. Davis, ___ U.S. ___, 96 S. Ct. 1155 (1976), in dismissing a §1983 action based on defamation, recognized that a plaintiff has a heavy burden to sustain in order to implicate a liberty interest sufficient to invoke procedural due process. See also, Meachum v. Fano,___ U.S. ___, 96 S. Ct. 2532 (1976). This principle should be followed in this case. The foster care program established by New York, as part of a comprehensive program, involving both administrative agencies

and the judicial system, should not be altered by a federal court under the authority of the due process clause in the absence of any showing of grave abuses under the present procedures.

(3)

Assuming, arguendo, that due process does require a hearing before a foster child can be removed from a particular home, it is submitted that the procedures promulgated by the City of New York, on August 5, 1974, during the pendency of the court proceeding, satisfied the requirements of due process. The procedure is set forth as Appendix C annexed to the Jurisdictional Statement. The City's procedure provides for a hearing at the request of the foster parents. At the hearing, the parents are permitted to have counsel, present evidence and to cross-examine opposing witnesses.

The District Court objected to the City's procedures because the hearing would only be provided at the request of the foster parents. No hearing would be provided where the child was returned to his natural parents and the natural parents would not be a party to the pre-removal hearings.

The City's procedure properly requires the foster parents to request a hearing. The purpose of the hearing would be to review the reasons for the agency's determination to remove the child from the foster care home. If the foster parents do not request a hearing and are therefore in agreement with the transfer there would be no purpose to a hearing.

As we discussed above, the City's procedure satisfies the claims of the

original counsel for all the plaintiffs. As Judge Pollack noted, in his dissent, the District Court's mandate that a hearing be provided even when not requested by foster parents has come as a surprise to all the defendants (dissenting opinion, pp. 4-5).

The District Court's provision for a hearing, even when no foster parent requests it, is apparently based on an assumption, without any proof in the record, that the professionals charged with the responsibility of operating the foster care program will act adversely to the child. Such an unsupported conclusion does not provide a basis to impose such a procedure on a state or a municipality.

The requirement of a hearing even where there is no request imposes a huge administrative burden on the City of New

York. Since the implementation of the new procedures in 1974, there have been only 26 hearings, which included 16 hearings in all of 1975. The small number of hearings requested indicates that the social services agencies are rendering decisions not adverse to the child.

The District Court order will require hearings for all 2800 transfers a year. The defendants, in a time of great fiscal crisis, will be required to hire more than 100 employees to act as hearing officers and child representatives. In addition to the expense and administrative burden, the holding of thousands of hearings will result in inevitable delays in moving children.

The City's procedures properly do not require a hearing where the child is to be returned to the natural parent. In New York State, in the absence of abandonment, a

statutory surrender or a judicial finding of unfitness, the child must be returned to his natural mother. See Spence Chapin Adoption Service v. Polk, 29 NY 2d 196 (1971). See also, Boone v. Wyman, 295 F. Supp. 1143, 1150 (S.D.N.Y., 1969), affd. 412 F. Supp. 857 (2d Cir., 1969), cert. den. 396 U.S. 1024 (1970). A due process hearing would place the natural parents in an unfair position since it would compel them, in an administrative proceeding, to justify their rights to their own children. As we noted above, this would be contrary to the purpose of foster care to return the children to the natural parents as soon as the parents are ready to care for them.

Since the implementation of the new procedures, only seven foster parents have

sought review of decisions to return foster children to their natural parents, despite the fact that there have been almost two thousand such decisions since 1974. In light of this history, it is unnecessary to require such hearings, at which the natural parents participate, which would inevitably result in emotional confrontations between foster parents and natural parents to the detriment of the foster child.

Where a hearing is held to determine whether a child should be transferred from one foster home to another, the City's procedure properly refuses to allow the natural parent to participate. The natural parents, who at this proceeding have no desire to have the child returned to them, would not add anything of substance to the proceeding and their participation would

only result in delay and confusion on the narrow issue before the hearing officer.

(4)

With respect to the issue relating to the class action, the District Court certified the class to include all foster children who have lived continuously for more than one year in the same foster home. The acceptance of the one year period as requested by the plaintiffs highlights the unusual nature of this case. There is nothing in the record to show that at one year the relationship becomes so substantial as to warrant the invocation of the due process clause. It is submitted that the relationship of a foster child who has been in a home for one year, with his foster parents is of a different character than the relationship of a foster child, who has been living continuously in a foster

home for five years.

Judge Pollack, dissenting in the instant case, stated in words peculiarly applicable to all the issues raised on this appeal (p. 7):

> "In holding that a child's interest requires that foster parents have a formal voice in any decision to remove the child after a year of foster parentage or whenever the child is placed with them for 'long term care' the Court first undertakes to express a social policy preference for a one year rather than the present statutory two year period, and then hedges by promulgating a vague standard (as yet indefined in this system) apparently meant to test foster parent - child relationships from their incipiency. There is no support for such a use of the Fourteenth Amendment.

CONCLUSION

FOR THE FOREGOING REASONS, THE QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL AND MERIT PLENARY CONSIDERATION OF THE COURT. PROBABLE JURISDICTION SHOULD BE NOTED AND THE CASE SET FOR ORAL ARGUMENT.

August 6, 1976.

Respectfully submitted,

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L. KEVIN SHERIDAN,
LEONARD KOERNER,
ELLIOT P. HOFFMAN,
of Counsel.

APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
May 24, 1976

Marttie L. Thompson, Esq.
Community Action for Legal
Services, Inc.
335 Broadway
New York, N.Y. 10013

Re: Bernard Shapiro, Exec. Dir. of New York State Bd. of Social Welfare, et al.; Danielle and Eric Gandy, et al.; James Dumpson, Admr. of New York City Human Resources Administration, et al.; and Naomi Rodriguez, et al. v. Organization of Foster Families for Equality and Reform, et al. Nos. A-985, A-986, A-987 and and A-988

Dear Sir:

The Court today entered the following order in the above-entitled cases

The applications for stay of the judgment and order of the United States District Court for the Southern District of New York (74 Civ. 2010), presented to Mr. Justice Marshall and by him referred to the Court, is granted

pending the timely docketing of an appeal, or appeals, with this Court.

Very truly yours,

Michael Rodak, Jr., Clerk
By Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

cc: Hon. Louis J. Lefkowitz
Atty. Gen. of New York
Two World Trade Center
NYC 10047

Ms. Helen L. Buttenwieser
575 Madison Ave.
NYC 10022

W. Bernard Richland, Esq.
Corporation Counsel NYC
Rm. 1637, Municipal Bldg.
NYC 10007

Marcia Robinson Lowry
Children's Rights Project -
N.Y. Civ. Lib. Union
84 Fifth Ave.
NYC 10011

John F. O'Shaughnessy, Esq.
Nassau County Atty.
1 West St.
Mineola, N.Y. 11501

APPENDIX B

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-v-

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCE ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as
----------x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

74 CIV.2010 (R.L.C.)

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Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New york State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants

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S I R S :

NOTICE is hereby given that the defendants James Dumpson, Elizabeth Beine, and Adolin Dall hereby appeal to the Supreme Court of the United States from

the order and judgment entered herein in the Office of the Clerk of the United States District for the Southern District of New York on april 14, 1976 wherein it is adjudged that New York Social Services Law §§ 383 (2) and 400 and N.Y.C.R.R. §450.14 as presently applied are unconstitutional.

This appeal is taken pursuant to 28 U.S.C. §1253.

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York
Attorney for Defendants,
Dumpson, Beine and Dall
Office and P.O. Address:
Municipal Building
New York, N.Y. 10007

By_____
CARL SANDERS

TO:

MARCIA ROBINSON LOWRY, ESQ.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
Attorney for Plaintiffs
Organization of Foster Families
for Equality and Reform
Madeline Smith
Ralph and Christiane Goldberg,
on behalf of themselves and all
others similarly situated

HELEN L. BUTTENWIESER, ESQ.
575 Madison Avenue
New York, New York 10022
Attorney for Danielle
and Eric Gandy
Rafael Serrano, on behalf of
themselves and all others
similarly situated

MARTTIE LOUIS THOMPSON, ESQ.
Community Action for Legal Services, Inc.
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Attorney for Intervenor-Defendants
Naomi Rodriguez
Rosa Diaz
Mary Robins
Dorothy Nelson Shabazz

JOHN F. O'SHAUGHNESSY, ESQ.
County Attorney for Nassau County
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Mineola, New York 11501
Attorney for Defendant
James P. O'Neill

LOUIS J. LEFKOWITZ, ESQ.
Attorney General
Two World Trade Center
New York, New York 10049
Attorney for Defendants
Shapiro and Lavine

APPENDIX C

PROCEDURE FOR REMOVAL OF CHILDREN
FROM FOSTER FAMILY CARE

August 5, 1974

TO: Executive Directors, Voluntary Child Caring Agencies

FROM: Carol J. Parry, Assistant Administrator Special Services for Children

SUBJECT: Removal of Children From Foster Family Care
SSC Procedure No. 5 - August 5, 1974

Enclosed are copies of the above named procedure which required the use of a new Exp. Form FC-6.

You will note that the model Exp. Form FC-6 bears the letterhead of Special Services for Children. Each agency should use the identical text on its own letterhead in accordance with the procedure.

Enc. (2)

THE CITY OF NEW YORK - HUMAN RESOURCES ADMINISTRATION
DEPARTMENT OF SOCIAL SERVICES - SPECIAL SERVICES FOR CHILDREN

SUBJECT: REMOVAL OF CHILDREN FROM FOSTER FAMILY CARE — SSC PROCEDURE NO. 5

TO: Executive Directors, Voluntary Child Caring Agencies
Staff, Special Services for Children — August 5, 1974

I. INTRODUCTION

In recognition that there are considerations of due process which should be protected in removal of children from foster family homes, and at the same time bearing in mind that the Commissioner of Social Services has the duty and responsibility to provide care and services for children who are public charges which are in their best interests, the following procedural changes within the framework of Social

Services Law Section 400 and SDSS Regulation 450.14 are to be instituted prior to the removal of a child from a foster home. <u>These changes do not apply when a child is being discharged to his own family home</u>, in which case the procedural instructions outlined in Appendix A, attached, shall be followed. They also do not apply when the health and safety of a child are endangered. In such a case the child should be removed immediately. The instructions below, which provide for an Agency Conference and an SSC Independent Review, <u>do</u> apply to children in both Voluntary Agency or SSC Directly Operated Programs who have been placed in boarding homes under a plan for long-term care, or who have remained in shelter boarding homes for a period of one year or more, and are relevant to situations where a child is being transferred

to another boarding home, to another child care facility, or to an adoptive home.

II. DETAILED INSTRUCTIONS

A. Notice of Intention to Remove a Child From a Foster Home

1. Sound casework practice should include home visits with foster parents whenever removal of a foster child from their home is being considered. In such visits the reasons for the plan should be interpreted to the foster parents so that they be afforded an opportunity to discuss the situation and cooperate in carrying out the plan. Such visits and discussions should take place as early as possible so that both the foster parents and children may be well prepared for any change.

2. If the ultimate casework decision is

to proceed toward removal of the child from the foster home in situations where the imminent health and/or safety of the child is not involved, or where removal is not for the purpose of returning the child to his own family home, the Voluntary Agency caseworker shall prepare a Notice of Intention to Remove a Child from a Foster Home, Form Exp. FC-6, quintuplicate; the SSC caseworker shall prepare the Form Exp. FC-6, in quadruplicate.

3. If the foster parents are being formally advised during a home visit of the decision to remove the child, the caseworker should have available the above prepared Form Exp. FC-6 with the reasons for the decision stated thereon. After discussion and inter-

pretation, which include the alternatives of an Agency Conference and/or Independent Review to which he is entitled, the worker shall provide the foster parents with a dated original and one copy of the Form.

4. The foster parents should be informed of the need to express their reaction to the plan for removal of the child by checking the appropriate boxes on the Form Exp. FC-6, which can then be returned to the caseworker at the time of the visit. Upon return to the office, an SSC caseworker will date the third and fourth copies of Form Exp. FC-6, filing the third copy in the case record and, if the foster parents are not in agreement with the plan, forward the fourth copy to the SSC Independent Review Team Supervisor.

A Voluntary Agency caseworker will similarly date his third, fourth, and fifth copies and forward the third copy to the SSC IARP Team, and if the foster parents do not accept the plan, forward the fourth copy to the SSC Independent Review Team Supervisor, and file the fifth copy in the agency case record.

5. If the foster parents have no objection to the removal of the child, the caseworker shall request them to execute the waiver on Form Exp. FC-6 and discuss with them arrangements for removal of the child. The Voluntary Agency should forward one copy of the Form to the IARP Team, a second copy to the SSC Independent Review Supervisor.

6. If the foster parents do not wish to

execute the waiver and/or oppose the removal of the child from their home, the caseworker shall explain the processes of the Agency Conference and Independent Review options available to them, as well as their option to subsequently execute the waiver at any stage of the Agency Conference and/or Independent Review, and impress upon them the urgency of making immediate arrangements for the scheduling of such a Conference and/or Independent Review. An Agency Conference, if desired, must be held within 5 days of the date of the Notice on Form Exp. FC-6. The foster parents should therefore be helped to state their request or to complete the appropriate boxes on the Form at the time of the caseworker's visit and delivery of the

Form to them. If they are unwilling or unable to do this at that time, they should be advised to telephone the caseworker within 48 hours of the date of the Notice if they wish an Agency Conference, in view of the narrow time frame involved. An Independent Review must be requested within 10 days of the date of Notice on Form Exp. FC-6 with the Review required to be held within 10 days from the date of their request for one. The foster parents should be advised that the time frames above will be strictly adhered to.

7. If the foster parents indicate that they wish to request an Agency Conference and/or Independent Review at the time of the caseworker's visit, their complete copy of the Notice on

Form Exp. FC-6 should be accepted from them. If they are requesting an Independent Review at that time, or may request it later, they must be advised to make the required telephone request to the SSC Independent Review Supervisor within 10 days of the date of the Notice on Form Exp. FC-6.

8. If for any sound reason the notification of the decision for removal is not delivered during the course of a home visit, the prepared original and the copy of Form Exp. FC-6 shall be mailed to the foster parents, dated as of the date of mailing.

9. At any stage of the foregoing procedure, the foster parents may give an informed written waiver of their right to an Agency Conference and/or Independent Review and return the child

to the Voluntary Agency or SSC Direct Care Program.

B. <u>The Agency Conference</u>

1. When indicated during the home visit, or following the receipt of a phone call from the foster parents requesting an Agency Conference, the SSC or Voluntary Agency caseworker or supervisor shall advise the foster parents of the time and place of the Conference, that the purpose of the Conference is to review the basis for the decision with the foster parents only, and that no other representative will be allowed to attend. The date of the Conference shall be set within five days of the date of the notice on Form Exp. FC-6 to the foster parents.

2. The conduct of the Conference shall be

held in accordance with casework principles and concepts, (as distinct from the legal concept of "due process" which applies in the Independent Review), with the foster parents given full opportunity to express their objections to the removal of the child and the reasons therefore. A complete summary of the Conference shall be entered in the case record with a Voluntary Agency preparing a copy for forwarding to the SSC IARP Team, and another copy for presentation at the time of the hearing should an Independent Review also be requested.

C. <u>The Independent Review</u>

1. Upon receipt of a phone call from the foster parents by the Independent Review Supervisor requesting an Independent Review, the Supervisor shall

determine if a Conference at the Agency had been requested and if the foster parents intend to be represented at the Review. An Independent Review must be requested within 10 days of the Notice on Form Exp. FC-6 and be scheduled within 10 days of the date of the request by the foster parents. The Independent Review Supervisor shall notify the SSC Direct Care Unit, or the Voluntary Agency and the appropriate IARP Team of the date and time of the scheduled hearing and request they be present and be prepared to present their position and any supporting evidence. A copy of the dated notice on Form Exp. FC-6 returned by the foster parents shall be delivered to the Independent Review Supervisor within 48 hours. If the

foster parents indicate their intention to be represented by Counsel, the Independent Review Supervisor shall advise the HRA Office of Legal Affairs in writing of the time and place of the Review so that Counsel may participate.

If two agencies are involved, one the agency carrying family case planning responsibility, the other the agency providing the foster care to the child, both must be included and participate in the planning and decision.

2. The Independent Review shall be conducted by the Independent Review Officer of SSC in accordance with the concepts of due process, in that:

   a. The Review shall be heard before an SSC official on a supervisory level who has had no previous

involvement with the decision to remove the child. (The only information appropriate for the Reviewer to possess prior to the conduct of the Review is a copy of Form Exp. FC-6, Notice of Intention to Remove a Child from a Foster Home, given to the foster parents, including the basis for the foster parents' objections thereon, and the date of the scheduled hearing);

b. The foster parents may be represented by Counsel and have the right to present witnesses and other evidence on their behalf;

c. The SSC Direct Care Unit or the Voluntary Agency and the appropriate IARP Team, as the case may be, shall be present, have

the right to present testimony and evidence in support of their decision to remove the child, and be represented by Counsel;

d. Witnesses may be cross-examined, and all evidence presented is subject to review by all parties;

e. There shall be a tape recording or stenographic record of the Review and the foster parents shall be entitled to a copy or transcript thereof, upon request and payment of the cost for duplication;

f. The Reviewer shall render a written decision within five work days after the Review setting forth the decision and the reasons therefore, and shall advise the foster parents of

their right to a State Fair Hearing;

g. The decision in writing shall be mailed to the foster parents and to their Counsel if they are so represented.

3. All persons other than the parties (foster parents, SSC Direct Care Program worker and supervisor, Voluntary Agency worker and supervisor, and IARP Team representative) and their Counsels shall be excluded from the Review Room unless giving testimony. All witnesses shall be sworn, except that parties may stipulate that the testimony is deemed as being given under oath.

4. The SSC Direct Care Program representative, Voluntary Agency representative, or SSC IARP representative shall present their case in support

of the removal of the child from the foster home first. The foster parents shall thereafter present their case in support of their objection to this decision. All witnesses shall be subject to cross-examination. If any portion of, or report contained in, a case record is to be used in support of the case for removal of the child, the Reviewer is required to allow the Counsel for the foster parents to also review such report or portion of the case record. Copies of this documentation or evidence should be duplicated for presentation to the Independent Review Supervisor.

5. Within five days after the completion of the Independent Review, the Reviewer shall render a written decision based upon the evidence and testimony

received at the Review, whether to affirm the decision to remove the child, or to disapprove such removal. The decision shall set forth the facts relied upon in reaching such decision, and if the decision is to affirm the removal of the child shall advise the foster parents of their right to request a State Fair Hearing pursuant to Section 400 of the Social Services Law. Copies of the Independent Review decision shall be forwarded to the Directors of the Bureau of Child Welfare and the SSC IARP Program. The decision of the SSC Independent Review Supervisor is binding on the Child Caring Agency.

6. The Independent Reviewer shall also mail copies of the written decision to the foster parents and their

Counsel if represented, as well as to the SSC Direct Care Program and/or Voluntary Agency and IARP Team. In addition, the Reviewer may, if so desired, elect to notify the partes by telephone.

7. If the Independent Reviewer affirms the decision to remove the child from the foster home, the child shall not be removed for at least three days after written notice of the written decision is mailed to the foster parents, or prior to a proposal affective date of removal, whichever occurs later.

TO: Date:

Notice of Intention
To Remove A Child
From A Foster Home.

Dear

The care and attention you have given to foster child(ren) in your home is greatly appreciated. This has been a service not only to the child(ren), but to the entire community. To continue to plan for

_____ _____

_____ _____

we now consider it in (his) (her) (their) best interest(s) to leave your home on or about (date)_____.

The plan for the child(ren) is to:

☐ place (him) (her) (them) in another foster home or other appropriate facility because_____
_____
_____
_____
_____

☐ place (him) (her) (them) in an adoptive home because_____
_____
_____

If you have no objection to the removal of the child(ren) from your home, please

indicate this by signing the waiver on page two and return it to your caseworker immediately.

However, if you have any objection to the removal of the child(ren) from your home, you may request an Agency Conference with your caseworker and supervisor, which shall be held within five (5) days from the date of this notice, at which time you may present your reasons for objecting to the child(ren)'s replacement. Please telephone immediately if you desire such a conference. Indicate your objections by checking the appropriate box on the reverse page, and return it to your caseworker.

You may also request an Independent Review within ten (10) days of the date of this notice, in addition to or instead of the Agency Conference. This Independent Review will be held at the Department of Social Services, Special Services for Children office within ten (10) days from the date of your request, at which time you may be represented by an attorney or other representative and present witnesses and other information you consider important. You also will be able to question the Agency's witnesses. Please call_____, SSC Independent Review Team Supervisor, at_____ immediately, if you desire such a review and state whether you except to be represented. You should also indicate your objection below and check the appropriate box on this letter and return it to your caseworker.

If we do not hear from you within ten (10) days, we will assume that you have accepted the plan and proceed with the child(ren)'s replacement.

Very truly yours,

Caseworker

☐ I have no objections to the removal of the foster child(ren) from my home and agree to return the child(ren) to the Agency.

☐ I object to the removal of the child(ren) from my house because

_____

_____

_____

☐ I desire a conference with my caseworker and supervisor.

☐ I desire both a conference and independent review.

☐ I desire an independent review instead of a conference.

☐ I expect to have a representative present at the review.

Dated:_____Foster Parent(s)_____

_____

PLEASE NOTE: IF YOU OBJECT TO REMOVAL OF THE CHILD(REN) FROM YOUR HOME,

YOU ARE ENTITLED TO A STATE FAIR HEARING, IN ADDITION TO THE AGENCY CONFERENCE AND INDEPENDENT REVIEW. HOWEVER, THE CHILD(REN) MAY BE REMOVED FROM YOUR HOME, FOLLOWING THE INDEPENDENT REVIEW, IF THAT IS THE INDEPENDENT SUPERVISOR'S DECISION.

Exp. Form FC-6
Aug., 1974

Appendix A - Procedure For Implementation of SDSS Regulation 450.14 for Ten-Day Notice Prior to Removal of Child From His Foster Home

Note: The procedure described below, with model form letter on the reverse side, is applicable only when a child is being discharged to his own parents or legal guardian. In all other cases of removal of a child from his foster home, SSC Procedure No. 5, August 5, 1974 applies.

At least ten days prior to the removal of a child from his foster homes, an agency shall notify the foster parents in writing of the plan to remove the child and the reasons therefore, giving the date of removal, advising the foster parents of their right to a conference with a social services official, should they so desire, and their right to have a representative at the conference.

Foster parents who do not object to the

removal of a child from their home may waive in writing their right to the ten-day notice.

If a conference is requested, voluntary agencies should contact the Director of the Inter-Agency Relationships Program, or, if applicable, the Director of the BCW Office having planning responsibility, to arrange the conference. When the conference is scheduled, SSC will request the agency to supply necessary background information in writing. Because of the tight time frame, immediate cooperation and communication between your agency and SSC is necessary. Kindly inform SSC if your foster parent(s) plans to bring a representative to the conference.

The social services official shall schedule the conference within ten days of receipt of such request and render a decision in

writing within five days to the foster parents, their representative, if any, and the authorized child-caring agency. The written decision shall include a statement that the foster parents have a right to appeal to the New York State Department of Social Services and request a fair hearing in accordance with SSC Section 400.

In the event a foster parent requests a conference, the child shall not be removed from the foster home until at least three days after the notice of decision is sent.

This procedure replaces SSC memorandum of September 13, 1973 on the above subject.